Supreme Court, U.S.
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No. 92-1916

In the Supreme Court of the United States

October Term, 1993

JANICE FARLEY, et al.,

Petitioners,

v.

COMMISSIONER OF THE MAINE DEPARTMENT OF HUMAN SERVICES and MAINE DEPARTMENT OF HUMAN SERVICES,

Respondents.

Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Maine Supreme Judicial Court correctly held that the State's denial of petitioners' claims for retroactive AFDC pass-through benefits did not constitute a taking violative of the Fifth and Fourteenth Amendments.

2. Whether the Maine Supreme Judicial Court correctly held that petitioners' claim that they were entitled to retroactive AFDC pass-through benefits as an essential element of procedural due process was barred by the doctrine of sovereign immunity.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Commissioner and Maine Department of Human Services (collectively "the State"), submit that the petition should be denied because the decision of the Maine Supreme Judicial Court was correct and because there are no special or important reasons to grant *certiorari*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners' due process claim for retroactive AFDC pass-through benefits was brought pursuant to 42 U.S.C. §1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Also pertinent to the Court's analysis of the AFDC statutory scheme, in addition to the constitutional and statutory provisions set forth in the petition, is 42 U.S.C. § 656(a)(1), which provides: "The support rights assigned to the State under

section 602(a)(26) of this title or secured on behalf of a child receiving foster care maintenance payments shall constitute an obligation owed to such State by the individual responsible for providing such support."[1]

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1 Note that petitioners' rendering of 42 U.S.C. § 602(a)(8)(A)(vi), App. 1a, contains minor textual inaccuracies. In addition, the provision reproduced by petitioners at App. 3a¶3 is actually 42 U.S.C. § 657(b)(1)(1982 ed., Supp. III), not 42 U.S.C. § 651 as advertised.

STATEMENT OF THE CASE

This petition represents the last gasp in a saga of welfare litigation begun in *Wilcox v. Ives*, 676 F.Supp. 355 (D.Me. 1987), *aff'd* 864 F.2d 915 (1st Cir. 1988).

In *Wilcox*, the plaintiffs challenged a federal regulation governing the distribution of so-called "pass-through" payments to AFDC recipients. The regulation was invalidated as inconsistent with the governing statute, and prospective relief was ordered. In its decision the U. S. district court expressly noted that retroactive relief was barred. 676 F.Supp. at 361. The petitioners then sought retroactive relief in the state courts, resulting in the decision with respect to which they now seek *certiorari*. This sequence and its legal context are more fully recounted below.

The $50 pass-through mandated by the federal AFDC statute represents a portion of the child support moneys assigned to the State by each AFDC recipient as a condition of receipt of benefits, and thereafter collected by the State from absent parents. 42 U.S.C. § 657(b)(1)(1982 ed., Supp. III)(pass-through); 42 U.S.C. §§ 602(a)(26), 656(a)(1)(assignment). Enacted as an amendment to the AFDC statute in 1984, the pass-through was intended to offset the reduction in welfare benefits caused by a related, contemporaneous amendment which required

inclusion in the AFDC filing unit of all family members living in the home for purposes of determining income, eligibility and benefit levels. *See Bowen v. Gilliard*, 483 U.S. 587, 594 (1987). The pass-through is thus not a mere "bonus" unrelated to regular AFDC benefits, but "an integral element of the AFDC support system envisioned by Congress". *Wilcox*, 864 F.2d at 919-920.

The federal regulation challenged in *Wilcox* provided that even where more than one month of child support arrearages were collected in any given month, only one $50 pass-through was required to be made to the AFDC recipient for that month. 45 C.F.R. §302.51; *see Wilcox*, 864 F.2d at 916-917 (quoting text). Until the date of the final judgment in *Wilcox*, this regulation had the force of positive law, and the State complied with it faithfully.

In the *Wilcox* final judgment, the district court struck down the regulation, ordering prospective and notice relief, but not retrospective relief, which, it held, was barred by the Eleventh Amendment. *Wilcox*, 676 F.Supp. at 361. The State provided the required notice and altered its practice to bring it into full compliance with this order.

Subsequently, in 1988, Congress responded to the *Wilcox* decision by amending the governing statute. Under the amendment, only one $50 pass-through is

generally required even when several months of arrearages are collected at once, unless the absent parent made each child support payment in the month when it was due. *See* 42 U.S.C. §657(b) as amended by P.L. No. 100-485, §102. As Judge Breyer noted, Congress thereby adopted the Secretary's original position in large part. *Wilcox,* 864 F.2d at 926 (Breyer, J. concurring). The State's practice was again altered to accord with this amendment.

After the First Circuit's decision in *Wilcox,* Petitioners initiated this case at the administrative level, requesting the State to provide the retrospective relief which had been unavailable in *Wilcox* because of the Eleventh Amendment bar. The State denied their request on sovereign immunity grounds. Petitioners then brought suit in Maine Superior Court pursuant to 42 U.S.C. §1983 challenging the denial as an uncompensated taking, violative of constitutional prohibitions. They also asserted their right to due process hearings, maintaining further that, in order to be meaningful, the hearings must result in relief in the form of retroactive AFDC benefits.

On appeal, the Maine Supreme Judicial Court held that there had been no taking, since petitioners had "no property rights in the pass-through payments at issue" which were cognizable under the takings clause; and further held that petitioners' due

process claim was barred by the doctrine of sovereign immunity. *Farley v. Department of Human Services*, 621 A.2d 404, 406, 408 (Me. 1993), App. 10a, 13a.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE MAINE SUPREME JUDICIAL COURT ACCORDS FULLY WITH CONTROLLING PRECEDENTS ESTABLISHED BY THIS COURT.

A. *Bowen v. Gilliard* Requires The Conclusion That The State's Denial Of Retroactive AFDC Pass-Through Benefits Did Not Represent An Unconstitutional Taking.

The petitioners contend that the State's denial of retroactive AFDC pass-through benefits violates the takings clause of the federal constitution. In order to prevail on this claim, however, petitioners must show that a right to receive such pass-through benefits is cognizable as property under the takings clause. This they cannot do.

Under the AFDC statute, pass-through benefits are accorded to a welfare recipient in lieu of a portion of the child support payments assigned to the State by the recipient as a condition of the receipt of regular benefits. 42 U.S.C. §657(b)(1); *and see* 42 U.S.C. §602(a)(26). Accordingly, a right to receive pass-

through benefits can be no greater that the underlying right to receive child support payments which was assigned to the State.

This Court has determined that the statutory assignment itself does not effect a taking, since, prior to the assignment, a child in whose behalf support payments are received "holds no vested protectable expectation" that such payments will continue. *Gilliard*, 483 U.S. at 607; *and see Johnson v. Cohen*, 836 F.2d 798, 807 (3rd Cir.1987)(*Gilliard* conclusively held that no property interest cognizable under the takings clause existed in child support payments). If an AFDC recipient holds no property interest cognizable under the takings clause in child support rights, even *prior* to the statutory assignment of such rights to the State, it follows that after the assignment, *a fortiori*, the recipient holds no cognizable property interest in the pass-through benefits which she receives in lieu of child support.

The logic of *Gilliard* thus poses an insuperable barrier to petitioners' takings claim. Their attempt to circumvent this barrier by positing that the statute somehow constitutes a "'contract' between the custodial parent and the State" must surely be unavailing. Petition, 12. Subject to the Constitution,

a statute is the law of land. It is not a contract, and is not susceptible to analysis as such.2/

The constitutional takings issue raised by petitioners in this case is not new. It was conclusively resolved by this Court in *Gilliard*. In effect, though they do not say so, petitioners have asked this Court to consider overruling an established precedent of long standing; yet they fail to directly confront the logic of that precedent. Under these circumstances, there is no reason to grant *certiorari*.

B. The Conclusion That Petitioners' Due Process Claim Is Barred By The Doctrine Of Sovereign Immunity Is Required By This Court's Holding In *Will v. Michigan Department Of State Police.*

The petitioners next maintain that the State's denial of retroactive AFDC pass-through benefits violates constitutional due process requirements. However, petitioners' due process claim, prosecuted pursuant to 42 U.S.C. § 1983, cannot be described

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2/ Even without *Gilliard*'s unequivocal holding to the effect that an AFDC recipient has no property right cognizable under the takings clause in child support payments, the recipient would *still* have no cognizable property right in pass-through benefits, since under the statute, all child support rights are unconditionally assigned to the State. *Mosley v. Hairston*, 920 F.2d 409, 417 (6th Cir.1990).

otherwise than as a claim for retroactive monetary relief against a State.[3/] This Court has conclusively ruled that retroactive monetary relief is not available to plaintiffs, whether in state or federal court, in section 1983 suits against a State, since neither a State nor a state official sued in her official capacity for retroactive monetary relief is a "person" within the meaning of the statute. *Will v. Michigan Department of State Police*, 109 S.Ct. 2304, 2312 (1989).

Will's rationale can be traced to *Quern v. Jordan*, 440 U.S. 332 (1979). In *Quern*, this Court made clear that in enacting section 1983, Congress had not intended to override "the traditional sovereign immunity of the States" embodied in the Eleventh Amendment. 440 U.S. at 341. *Will* laid to rest any lingering doubt as to whether section 1983 afforded plaintiffs any greater latitude in state than in federal court, resolving that question in the negative. *Hafer v. Melo*, 112 S.Ct. 358, 364 (1991), citing *Will*, 109 S.Ct. at 2309.

3/ Any attempt by petitioners to impose another characterization, by subsuming a recovery of retroactive pass-through benefits within an injunction mandating "meaningful" due process relief, should be recognized for what it is: a brazen end-run around the rule of *Edelman v. Jordan*, 415 U.S. 651, 665-669 (1974)(a court may not evade the prohibition against an award of retroactive monetary relief by fashioning it in the form of an equitable decree). *See Mosley*, 920 F.2d at 417.

Will is thus dispositive of petitioners' section 1983 due process claim. In view of this controlling precedent, the Maine Supreme Judicial Court's determination that petitioners' due process claim was barred by sovereign immunity must be regarded as unexceptionable.[4/]

Yet petitioners completely ignore *Will*. Instead, they rely on *McKesson Corp. v. Division of Alcoholic Beverages*, 110 S.Ct. 2238 (1990). This reliance is misplaced, since *McKesson*, which involved a claim that the State of Florida had exacted an unconstitutional tax, was brought under a state statute authorizing suits for a tax refund. Unlike the present case, *McKesson* was not a section 1983 claim for retroactive monetary relief. Moreover, as this Court expressly noted, the defendants in *McKesson* "concede[d] that the State waived any sovereign immunity from suit". 110 S.Ct. at 2257 n.34. Here, in contrast, there has been *no* waiver of sovereign immunity.

4/ While it did not cite *Will*, Maine's highest court relied on one of its own decisions which accurately prefigured *Will*, holding that the State "may constitutionally interpose [sovereign] immunity as a bar to a class action brought in a State court under 42 U.S.C. §1983 to recover the amount of past AFDC underpayments". *Thiboutot v. State*, 405 A.2d 230, 236-237 (Me.1979), *aff'd* 448 U.S. 1 (1980)(relying on *Edelman* and *Quern*). *See Farley*, 621 A.2d at 408, App. 13a.

Again, without saying so, petitioners have in effect asked this Court to reconsider and overrule its own clearly established precedent, namely, *Will*. Yet they have utterly failed to come to grips with the rationale underlying that decision. Again, therefore, this Court should have no difficulty in declining to grant the requested writ.

II. THE DECISION BELOW RAISES NO ISSUE WARRANTING FURTHER REVIEW.

A. This Case Focuses Retrospectively on Statutory and Regulatory Provisions Which Are No Longer In Effect.

The significance of this case is limited. While it obviously means something to petitioners on the one hand, and respondents on the other, it carries few implications for anyone else. This is because the statutory and regulatory regime within which the case arose has undergone substantial change.

First, the regulation which mandated only a single monthly pass-through, regardless of how many child support payments were collected, was struck down by *Wilcox*. Then the new regime mandated by *Wilcox* (one pass-through for every payment collected) was superseded in its turn by the 1988 statutory amendment which now governs. The rule of *Wilcox* held sway for less than a year.

This case will therefore have no prospective impact. Its retrospective impact is no broader than the class represented by petitioners. In view of the limited significance of the case,[5/] this Court should reject petitioners' implicit challenge to the settled law of *Gilliard* and *Will*, and should deny *certiorari*.

B. The Decision Below Conflicts With Neither *Bennett v. White* Nor Any Other Case Law To Which Petitioners Can Point.

Petitioners suggest that the decision of the Maine Supreme Judicial Court is in conflict, variously, with *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Bennett v. White*, 865 F.2d 1395 (3rd Cir.1989), *cert. denied* 492 U.S. 920 (1989). Petition, 7, 15. We address these contentions in turn.

Petitioners' claim that the decision below conflicts with *Goldberg* is based on the Maine court's statement that "the plaintiffs ... have no constitutionally protected property rights in the pass-through funds at issue here." In our view,

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5/ *See, Wilcox*, 864 F.2d at 926 (Breyer, J., concurring) ("because a contrary decision would not significantly affect AFDC law," it would be "pointless, and somewhat inappropriate, to dissent").

petitioners have taken this statement out of context.6/ We need not debate the merits of this issue here, however, because the statement in question was at most *obiter dictum* and, accordingly, harmless. The Maine Supreme Judicial Court did *not* base its holding on a finding that there was no denial of due process in this case. Rather, relying quite properly on *Thiboutot*, the court held that

> in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under 42 U.S.C. § 1983 to recover the amount of past AFDC underpayments....

Farley, 621 A.2d at 408, quoting *Thiboutot*, 405 A.2d at 237, App. 13a. This holding does not conflict with *Goldberg*; on the contrary, it is in full accord with the controlling jurisprudence of *Will*, *Edelman* and *Quern*.

Nor does the Maine court's decision present any

6/ While a right to pass-through payments may constitute a sufficient claim of entitlement to require due process under *Goldberg*, such a right clearly does not constitute property for purposes of the takings clause under *Gilliard*, as we demonstrate above. *See* this brief, *supra*, 4-5; *and see Thiboutot*, 405 A.2d at 235 ("the qualified nature of welfare rights makes a takings argument inapplicable").

conflict with *Bennett v. White*. In *Bennett*, the Third Circuit held that where Pennsylvania failed to pay over to recipients child support payments collected in excess of reimbursible benefits provided, an uncompensated taking, violative of the Fifth and Fourteenth Amendments, had occurred. 865 F.2d at 1402; *see* 42 U.S.C. §§ 657(b)(3), 657(c). However, *Bennett* did not deal with a denial of retroactive pass-through benefits, as this case does, but with multiple failures by Pennsylvania authorities, *inter alia*, to reassign support orders on termination of assistance, to promptly pay over collections made after termination of assistance, to pay over support collected in excess of what was due the State as reimbursement, and to cease support collections within three months after termination of assistance. 865 F.2d at 1401. Unlike the State of Maine here, Pennsylvania could not justify its actions in *Bennett* by pointing to federal regulations.

Indeed, crucial to a correct understanding of *Bennett* is the fact that the State defendants in that case *did not dispute that they were holding property belonging to plaintiffs*.[7/] In effect, Pennsylvania thereby conceded that a taking had occurred.

In this case, in contrast, the State of Maine does

7/ 865 F.2d at 1402 ("defendants do not dispute that ... [the State] held on to class members' property"); *and see Bennett v. White*, 671 F.Supp. 343, 349 (E.D.Pa. 1987)(to same effect).

not concede that the pass-through payments in issue were petitioners' property in any sense cognizable under the takings clause. On the contrary, the child support moneys underlying the pass-through were fully assigned to the State. Moreover, since the statutory assignment does not itself effect a taking, *see Gilliard*, it necessarily follows, *a fortiori*, that a denial of pass-through payments does not effect a taking either.

Bennett is therefore inapposite, and presents no conflict with the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 2, 1993

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